No. 91-1143

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

OWENS-CORNING FIBERGLAS CORPORATION, *et al.*,

Petitioners,

vs.

MARILYN ROSE WEBB, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Sixth Court of Appeals District of Texas at Texarkana

RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Opinion and Order of the Court of Appeals, Sixth District of Texas at Texarkana in *Pittsburgh-Corning Corp. v. Askewe, et al.* 1a

No. 91-1143

In The

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OWENS CORNING FIBERGLAS CORPORATION, *et al.*,

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Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Sixth Court of Appeals District of Texas at Texarkana

RESPONDENTS' BRIEF IN OPPOSITION

Respondents are Marilyn Rose Webb and others whose names are correctly set forth in the list of parties appearing at page ii of the Petition for a Writ of Certiorari. Respondents, Canadian residents, are plaintiffs in a state district court action in Texas in a suit filed against asbestos manufacturers who do business in Texas.

STATEMENT OF THE CASE

The statement of the case as contained in petitioners' brief is substantially correct insofar as it deals with the parties and the history of the cause of action in the Texas and British Columbia courts. Since the filing of the Petition for a Writ of Certiorari, the Court of Appeals for the Sixth Court of Appeals District of Texas has rendered its opinion in a related proceeding also involving an anti-anti suit injunction. That case involved additional plaintiffs who intervened in the suit that underlies this petition. The District Court of Harrison County, Texas, on June 13, 1991, granted another injunction, which was also upheld by the appellate court. The opinion in that case is attached hereto as Exhibit A.

In respect to perceived misstatements in petitioners' statement of the case, respondents are unaware of the number of lawsuits pending in state and federal courts in the United States alleging injury or death from exposure to asbestos products, and therefore are unable to agree or disagree with petitioners' statement (see Petition at 3). Petitioners also assert that none of them are incorporated in Texas. Respondents cannot admit this undocumented allegation because respondents are without knowledge. Even so, National Gypsum has its principal place of business in Texas and each other petitioner does business in Texas, and is therefore considered to be a resident of Texas for purposes of application of Texas law. *PPG Industries, Inc. v. Continental Oil Co.*, 490 S.W. 2d 297, 299 (Tex. Civ. App. — Houston [1st District] 1973, writ ref'd n.r.e.).

In respect to the statement in the first incomplete paragraph on page four of the petition, at least one plaintiff, Kenneth A. Flaman, alleged that he had been employed and worked in Texas. While it is true that the opinion of the British Columbia Supreme Court states that "the (claimants') conduct in continuing with their proceedings in Texas in the circumstances should be properly

described at oppressive" (A 95), petitioners have not thus far cited any British Columbian law that the plaintiffs violated when filing their suits in Texas. (*See* Petition at 5, "in violation of the law of British Columbia. A 95.")

Next, whatever condemnation of non-British Columbia plaintiffs the British Columbia court may have made, its determination has no effect whatsoever in the provinces of Alberta, Manitoba or New Brunswick. (*See* Petition at 5.)

REASONS FOR DENYING THE WRIT

I.

The doctrine of comity is not absolute; protection of jurisdiction of American courts overrides comity considerations.

This Court stated in *Société Nationale v. U.S. Dist. Court, S.D. Iowa:*

> [T]he concept of international comity requires in this context a more particularized analysis of the respective interests of the foreign nation and the requesting nation than petitioners' proposed general rule would generate. We therefore decline to hold as a blanket matter that comity requires resort to Hague Evidence Convention procedures without prior scrutiny in each case of the particular facts, sovereign interests, and likelihood that resort to those procedures will prove effective.

482 U.S. 522, 543-44 (1987).

This Court went on to hold that international comity does not require resorting to Convention procedures before beginning

discovery in that case under the Federal Rules of Procedure.

Whether comity will intervene to prevent an anti-suit injunction depends upon what activities are being enjoined. In *China Trade and Development v. M.V. Choong Yong*, 837 F.2d 33 (2nd Cir. 1987), the appellate court reversed an injunction that had been issued by the United States District Court for the Southern District of New York. In doing so, the Second Circuit's opinion observed that "parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously." *Id.* at 36. However, the circuit court went on to say, "[e]ven in *in personam* proceedings, if a foreign court is not merely proceeding in parallel but is attempting to carve out exclusive jurisdiction over the action, an injunction may also be necessary to protect the enjoining court's jurisdiction." *Id.* The court of appeals said that an anti-suit injunction might also be appropriate when a party was seeking to evade important policies of the forum court by litigating before a foreign court.

In explaining the interest of Texas in proceedings analagous to the present case, one jurist stated thusly:

> Comity is not achieved when the United States allows its multi-national corporations to adhere to a double standard when operating abroad and subsequently refuses to hold them accountable for those actions . . . Actions of our corporations affecting those abroad will also affect Texans . . . In the absence of meaningful tort liability in the United States for their actions, some multi-national corporations will continue to operate without adequate regard for the human and environmental cost of their actions.

Dow Chemical Company v. Castro Alfaro, 786 S.W. 2d 674, 687,

689 (Tex. 1990) (Doggett, J., concurring), *cert. denied*, ____ U.S. ____, 111 S. Ct. 671 (1991).

When confronted with the argument that the doctrine of international comity (as well as the act of state doctrine) required recognition of a foreign commission's exclusive authority to adjudicate an issue, a circuit court of appeals stated:

> We reject outright the notion that the law of a foreign country can unilaterally curtail the power of our federal courts to hear a dispute even though the dispute involves rights fixed by the laws of another nation. Only the Constitution and the laws of the United States can dictate what cases or controversies our federal courts may hear, and the parties have not directed our attention to any treaties or agreements with Saudi Arabia that would require our courts to refrain from exercising jurisdiction in this case.

Randall v. Arabian American Oil Company, 778 F.2d 1146, 1150 (5th Cir. 1985).

The Texas case of *Gannon v. Payne*, 706 S.W. 2d 304 (Tex. 1986), much relied upon by petitioners in the courts below as authority for the argument that comity requires adjudication of these disputes Canada, is not supportive of petitioners. In determining not to prevent parallel cases from proceeding in both the Alberta Court of Queen's Bench and the district court of Texas, the *Gannon* court recognized that the doctrine of comity was not absolute by saying, "[m]oreover, there is no evidence that the Canadian court has attempted to carve out exclusive jurisdiction in this case." *Id.* at 307.

Of course, should the injunction rendered by the Harrison

County district court be set aside, then exclusive jurisdiction over this case would revert to the Canadian courts, where, as witnessed by the action of the British Columbia court, injured parties are being prohibited from litigating in Texas. The Texas court has made no attempt to prevent parallel litigation from proceeding in Canadian courts. The Texas court has only said that the defendants in its court, petitioners here, cannot interfere with the jurisdiction of the Texas court to act. Texas courts have jurisdiction over the petitioners here by virtue of the petitioners doing business in Texas.

The closely analogous case of *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909 (D.C. Cir. 1984) is dispositive, unless, of course, this Court chooses to disapprove of the holding in that case. *Laker Airways*, like the instant case, involved an "anti-anti suit injunction." The district court for the District of Columbia was not attempting to enjoin any proceedings that might take place in the United Kingdom, but was only preventing parties over whom it had acquired jurisdiction from attempting to go to British courts so as to halt Laker Airways from proceeding in American courts. *Laker Airways* stated that:

> Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings.

Id. at 927.

The opinion continues, "comity varies according to the factual circumstances surrounding each claim for its recognition [and]

the absolute boundaries of the duties it imposes are inherently uncertain." *Id.* 937, citing *Hilton v. Guyot*, 159 U.S. 113, 164-65 (1895). "[T]here are limitations to the application of comity." *Laker Airways* at 937.

As in *Laker Airways*, the plaintiffs in the American court are foreign nationals. As in *Laker Airways*, a foreign court had already enjoined participation in an American action in respect to certain parties. (In *Laker Airways*, the British Court of Appeal had ordered Laker to dismiss its American suit against British Airways and British Caledonian.) The defendants in the American court all do business in Texas and are subject to Texas jurisdiction. Because the Texas defendants are all American corporations, properly before a Texas court, this differs from the facts in *Laker Airways*, where some of the enjoined defendants were American citizens but the two defendants who complained on appeal, Sabena and KLM, were foreign nationals. This would seemingly make the argument for intervention by the Texas court to protect its jurisdiction even stronger than in *Laker Airways*.

The public policy interest in *Laker Airways* of protecting anti-trust laws of this nation was an important motivation for the D.C. Circuit upholding the anti-anti suit injunction in that case. Equally compelling as a public interest consideration is Texas' concern about the quality of products that are placed in the stream of commerce in Texas or are manufactured by companies doing business in Texas. *Prosser & Keeton on the Law of Torts* § 4, at 25-26 (5th Ed. 1984).

Petitioners cite *Dames & Moore v. Regan*, 453 U.S. 654 (1981) as authority for their argument that the Texas injunction violates the spirit of international comity. As observed in *Laker Airways*, "[t]here is nothing in *Dames & Moore* which suggests that a district court may not exercise its discretion to enjoin a foreign action when necessary to preserve its jurisdiction." 731 F.2d at 943-44.

Petitioners accuse the Texas court of "chauvinistic concerns" (Petition at 19). Petitioners exhort this Court to instruct the eschewing of the "parochial concept that all disputes must be resolved under our laws and in our courts . . . ", citing *V. Bremen v. Zapata Offshore Company*, 407 U.S. 1, 9 (1972). *Gannon v. Payne* is certainly an expression by Texas courts that they are neither parochial nor chauvinistic when it comes to interpreting the law. A parallel proceeding with the Canadian court was allowed to proceed, so long as the Canadian court did not attempt to deprive Texas courts of their jurisdiction. Petitioners' assertion (Petition at 19) that the effect of the Harrison County injunction "is to oust the entire Canadian judicial system of its authority to hear that question" is simply untrue. As *Gannon v. Payne* demonstrates, a parallel proceeding in Canada would be appropriate under Texas law.

II.

The Act of State Doctrine is inapplicable in this case.

Interwoven in petitioners' arguments of comity is the dual contention that the action of the Texas court "offends Canadian sovereignty in the most fundamental way" (Petition at 18) and that the action of the Texas court violates the act of state doctrine. Petition at 14. The application of the act of state doctrine to anti-suit injunctions has been argued by at least one commentator. Bermann, *The Use of Anti-Suit Injunctions in International Litigation*, 28 COLUM. J. TRANSNAT'L L. 589 (1990). However, even Professor Bermann has been forced to admit, "I have found no federal case categorically rejecting international anti-suit injunctions on separation of powers grounds." *Id.* at 605. Professor Bermann has likewise conceded:

> To my knowledge, no court has categorically invoked the federal government's foreign relations

> power to bar state courts from issuing orders in restraint of foreign judicial proceedings. Interestingly, neither has any federal court to my knowledge suggested that a state court's exercise of injunctive power to restrain foreign judicial proceedings amounts under the circumstances to an infringement of Congress' or the Executive's constitutional authority to conduct the country's foreign relations.

Id.

Not even the enjoined parties in *Laker Airways* contended that the act of state doctrine was applicable. The *Laker Airways* court observed, "the parties have not invoked either the sovereign immunity doctrine or the act of state doctrine . . . That neither of these doctrines even arguably would apply here is further evidence that no significant British or other governmental interest would be violated by Laker's suit." *Laker Airways* at 942.

As this Court observed in *W.S. Kirkpatrick v. Environmental Techtonics Corporation International*, 493 U.S. 400, 110 S. Ct. 701 (1990) "[i]n every case in which [it had] held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory." *Id.* at ____, 110 S. Ct. at 704. This Court went on to say that the "[a]ct of state issues only arise when a court *must decide* — that is, when the outcome of a case turns upon — the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine." *Id.* at ____, 110 S. Ct. at 705 (emphasis in original). It is, of course, patently obvious that the Texas district court did not purport to declare invalid the official act of a foreign sovereign, nor does the outcome of this case turn upon the official action by a foreign sovereign.

The issue of whether the act of state doctrine could be invoked so as to deprive an American court of jurisdiction was raised in *Randall v. Arabian American Oil Company*. In that case, the court noted:

> ARAMCO contends that the act of state doctrine precludes us from not giving effect to the exclusive jurisdiction provision because that doctrine precludes courts of the United States from examining the validity of the public or governmental acts of a foreign sovereign.

778 F.2d at 1153.

In response to this argument the Fifth Circuit stated that the act of state doctrine did not apply nor did it compel enforcement of the Saudi Arabian exclusive jurisdiction provision. *Id.*

CONCLUSION

The arguments petitioners make are neither novel nor meritorious. Accordingly, it is respectfully submitted that this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A — OPINION AND ORDER OF THE COURT OF APPEALS, SIXTH DISTRICT OF TEXAS AT TEXARKANA IN *PITTSBURGH-CORNING CORP. V. ASKEWE, ET AL.*

In The
Court of Appeals
Sixth District of Texas at Texarkana

No. 6-91-080-CV

PITTSBURGH-CORNING CORPORATION, Appellant

V.

NORMAN BARNETT ASKEWE, ET AL, Appellees

On Appeal from the 71st Judicial District Court
Harrison County, Texas
Trial Court No. 88-0687

Before Cornelius, C.J., Bleil and Grant, JJ.
Opinion by Justice Grant

OPINION

Pittsburgh-Corning Corporation appeals from the granting of a temporary injunction that prevents them from pursuing an injunction in a Canadian court. The sole question on appeal in this case, as in a previous appeal,[1] is whether the district court abused its discretion by enjoining the appellant from pursuing

---

1. *Owens Illinois, Inc. v. Webb*, 809 S.W. 2d 899 (Tex. App.-Texarkana 1991, writ dism'd w.o.j.).

an injunction in a foreign court which would prevent the appellees from pursuing their Texas action. As before, we are again dealing with an anti-anti-suit proceeding. Because of the substantial identity between the facts involved in both appeals, we will provide only a synopsis of the facts in this opinion.

The underlying personal injury asbestosis suit was filed in the 71st District Court in Marshall in 1988. Plaintiffs (appellees) consisted of Canadians who are residents of British Columbia, Alberta, Manitoba, and New Brunswick. Pittsburgh Corning Corporation is a manufacturer of asbestos products. All damages were alleged to have occurred in Canada.

On November 10, 1989, the appellant began a proceeding in a trial court of British Columbia seeking to enjoin the Canadian plaintiffs from pursuing their claims in a Texas court. The Canadian trial court granted this injunction on December 6, 1989, and the British Columbia Court of Appeals affirmed this action as to all *British Columbian plaintiffs* by written opinion on November 5, 1990.

During this time, on November 20, 1989, appellees' counsel had obtained a temporary restraining order from the Texas district court restraining the appellant from seeking similar injunctions in the other Canadian provinces. Immediately after the rendition of an opinion by the Canadian trial court, on December 7, 1989, counsel withdrew his application for an injunction in the Texas court.

On the day that the British Columbia Court of Appeals rendered judgment against appellee, November 5, 1990, appellees' counsel once again sought and obtained an *ex parte* temporary restraining order from the Texas district court preventing appellant

from seeking similar injunctions in the Canadian courts of the provinces of residence of the remaining parties. After a hearing on November 19, 1990, the Texas court granted an injunction designed to prevent the appellant from pursuing any further anti-suit injunctive remedy in any Canadian court.

Owens-Corning and a number of other defendants appealed from this ruling in *Owens-Illinois, Inc. v. Webb*, 809 S.W. 2d 899 Tex. App.-Texarkana 1991, writ dism'd w.o.j.).

THE APPEAL IN THE PRESENT CASE

On May 31, 1991, the Texas court granted a temporary restraining order, followed by a temporary injunction on June 13, 1991, that was similarly designed to enjoin the appellant from pursuing any remedy in any Canadian court. This case differs from the prior case only in detail. The injunction is identical in effect, but protects a group of *additional* Canadian plaintiffs brought in after the ruling in the prior decision.

On appeal from the entry of a temporary injunction, the sole question for determination by this Court is whether the trial court abused its discretion by issuing the injunction. *Iranian Muslim Organization v. City of San Antonio*, 615 S.W. 2d 202, 208 (Tex. 1981). The test for abuse of discretion is not whether, in the opinion of the reviewing court, the factors present an appropriate case for the trial court's action; rather, it is a question of whether the court acted without reference to any guiding rules or principles. *Downer v. Aquamarine Operators, 701 S.W. 2d 238 (Tex. 1985), cert. denied*, 476 U.S. 11 1159, 106 S. Ct. 2279, 90 L. Ed. 2d 721 (1986).

Appendix A

Appellant brings two arguments that were not raised in the previous case:

1) The district court erred as a matter of law by interpreting TEX. CIV. PRAC. & REM. CODE ANN. § 71.031 (Vernon 1986) in such a way as to violate the *Act of State* doctrine;

2) TEX. CIV. PRAC. & REM CODE ANN. § 71.031 (Vernon 1986) is unconstitutional because it violates the *Separation of Powers* clause of the United States Constitution.

Appellant's argument based upon the *Act of State* doctrine is not supported by the authorities. The doctrine prevents the courts of this country, both federal and state, from inquiring into the validity of governmental acts of a recognized foreign sovereign committed within its own territory. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S. Ct. 923, 11 L. Ed. 2d 804, 823 (1964). The most recent authority cited to support their argument based upon that doctrine contains the folllowing language:

> We find it unnecessary, however, to pursue those inquiries, since the factual predicate for application of the act of state doctrine dees not exist. Nothing in the present suit requires the Court to declare invalid, and thus ineffective as "a rule of decision for the courts of this country," . . . the official act of a foreign sovereign.
>
> In every case in which we have held the act of state doctrine applicable, the relief sought or the defense interposed would have required a court in the United States to declare invalid the official act of a foreign sovereign performed within its own territory.

Appendix A

* * *

> The short of the matter is this: Courts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them. The act of state doctrine . . . merely requires that, in the process of deciding, the acts of foreign sovereigns taken within their own jurisdictions shall be deemed valid. That doctrine has no application to the present case becanse the validity of no foreign sovereign act is at issue.

Kirkpatrick Inc. v. Environmental Tectonics, 493 U.S. 400, 110 S. Ct. 701, 107 L. Ed. 2d 816, 822, 825 (1990).

As pointed out in this court's previous opinion, the Texas district court did not attempt to enjoin any Canadian court or other Canadian governmental body from taking any action. Both the prior injunction and the present one are directed at corporate citizens of Texas. Additionally, the trial court did not attack the validity of any act by a foreign sovereign. This point of error is overruled.

Appellant next argues that TEX. CIV. PRAC. & REM. CODE ANN. § 71.031, as interpreted by the district court, is unconstitutional because it infringes upon the power of the federal executive branch to conduct foreign policy. They specifically contend that the act of the Texas district court infringes upon the executive branch's power to define the form of relationship between Canada and the United States.

If the district court had sought to enjoin an arm of the

Canadian government, including the judiciary, from taking some action, this argument might have merit. However, it did not do so. Neither did it prevent the appellees from pursuing a substantive remedy in Canada. The district court merely protected its own jurisdiction by ordering United States citizens not to bring an action in a Canadian court to enjoin the litigants in its court from continuing their action in Texas.

As noted in *Laker Airways v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927, 930-31 (D.C. Cir. 1984):

> Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants.
>
> * * *
>
> [T]he district court was threatened with a potential *fait accompli* by the appellants which would have virtually eliminated the court's effective jurisdiction over Laker's facially valid claim. . . . Thus, there was nothing improper in the district court's decision to enjoin appellants from seeking to partcipate in the English proceedings solely designed to rob the court of its jurisdiction.

The primary purpose of a trial court is to provide full justice to litigants. Protection of this right by anti-anti-suit injunction, under these facts, does not constitute interference with the act of a foreign sovereign. Neither does it interfere with the power of the United States executive branch to create foreign policy. There is also no suggestion of any particular foreign policy presently in place with which this suit might interfere. This point of error is overruled.

Appendix A

In the remaining points of error, appellant repeats its arguments from the prior case that *comity* should prevent the action taken by the district court, and that the district court's interpretation and application of Section 71.031 creates an unnecessary conflict between Texas and Canadian law. These arguments were adequately addressed in our previous decision, and we adopt our ruling there. *See Owens-Illinois v. Webb*, 809 S.W. 2d 899.

The question presented in the present case is whether the district court abused its discretion by granting an anti-anti-suit injunction. The actions of the trial court are supported by the law. Accordingly, we find that the court did not abuse its discretion by granting the injunction.

The judgment of the trial court is affirmed.

s/ Ben Z. Grant
Ben Z. Grant
Justice

January 22, 1992
Filed January 22, 1992

Publish

Appendix A

Court of Appeals
Sixth District of Texas

JUDGMENT

Pittsburgh-Corning Corporation, Appelllant

No. 6-91-080-CV V.

Norman Barnett Askewe, Et Al, Appellees

Appeal from the 71st Judicial District Court of Harrison County, Texas (Tr. Ct. No. 88-0687). Opinion delivered by Justice Grant, Cornelius and Justice Bleil partcipating.

BE IT REMEMBERED, that in the above styled and numbered cause, in accordance with the Court's opinion of this date, the Court finds that there was no error in the judgment below. Therefore, it is ORDERED that the judgment of the court below is in all things AFFIRMED.

It is further ORDERED that the appellant Pittsburgh-Corning Corporation pay all costs incurred by reason of this appeal and that the cash deposit made in the trial court in lieu of an appeal bond be subject to and used for the payment of such costs.

RENDERED JANUARY 22, 1992
BY ORDER OF THE COURT
WILIAM J. CORNELIUS
CHIEF JUSTICE

ATTEST:
Tibby Thomas, Clerk